

# Order

Michigan Supreme Court  
Lansing, Michigan

November 1, 2010

Marilyn Kelly,  
Chief Justice

ADM File No. 2006-38

Michael F. Cavanagh  
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Justices

Proposed Amendments of  
Subchapter 9.100 *et seq.* and  
Rules 8.110 and 8.120 of the  
Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering amendments of Subchapter 9.100 *et seq.* of the Michigan Court Rules and Rules 8.110 and 8.120 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, [www.courts.michigan.gov/supremecourt](http://www.courts.michigan.gov/supremecourt).

As a context for review of this proposal, some background information may be helpful. The Attorney Grievance Commission submitted its proposal to the Court in 2006. The Court considered various provisions within the proposal, and before final review for purposes of publication, invited the State Bar of Michigan to convene a workgroup to review the proposal and submit preliminary feedback on it. The SBM did so, and the Court proceeded to final review of the proposal with the benefit of the input from both the AGC and the SBM. Thus, in several places there are alternative versions of language offered that reflect differing suggestions of the AGC and the SBM on a particular issue. In addition, the AGC submitted updated language in early 2010, some of which is reflected in the order.

In addition to the order for publication, the Court is releasing two documents that may be helpful in understanding the proposed changes. One document is a jointly-submitted AGC/SBM memo that describes the main points of difference in the proposals. Another document is a three-column chart that compares the current rule with the AGC proposal and any alternative language recommended by the SBM. The Court's order in several places varies from the language offered by either the AGC or SBM, and where it does so, the staff comment describes why the Court chose the language it did.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated in underlining and deletions are indicated by strikeover.]

## Rule 9.101 Definitions

As used in subchapter 9.100:

- (1) “board” means the Attorney Discipline Board;
- (2) “commission” means the Attorney Grievance Commission;
- (3) “administrator” means the grievance administrator;
- (4) “investigator” means a person pecially designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;
- (5) “attorney” or “lawyer” means a person regularly licensed, ~~or~~ specially admitted, permitted to practice law in Michigan on a temporary or other limited basis, or who is otherwise subject to the disciplinary authority of Michigan pursuant to order or rule of the Supreme Court;
- (6) “respondent” means an attorney named in a request for investigation or complaint, or proceedings for reciprocal discipline, based on a judgment of conviction, or transfers to inactive status under MCR 9.121;
- (7) “request for investigation” means the first step in bringing alleged misconduct to the administrator's attention;
- (8) “complaint” means the formal charge prepared by the administrator and filed with the board;
- (9) “review” means examination by the board of a hearing panel's ~~final~~ order on petition by ~~an aggrieved party~~ the administrator, complainant, or respondent;
- (10) “appeal” means judicial re-examination by the Supreme Court of the board's final order on petition by ~~an aggrieved party~~ the administrator, complainant, or respondent;
- (11) “grievance” means alleged misconduct;
- (12) “investigation” means fact-finding on alleged misconduct under the administrator's direction.
- (13) “disbarment” means revocation of the license to practice law.

- (14) “complainant” means a person who signs a request for investigation.
- (15) “disability inactive status” means inactive status to which a lawyer has been transferred pursuant to MCR 9.121 or a similar rule of another jurisdiction.
- (16) “disciplinary proceeding” means all matters filed with the board.

Staff comment: The proposed revisions in this rule would clarify and add to the definitions in the rules as a whole.

#### Rule 9.103 Standards of Conduct for Attorneys

- (A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.
- (B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar. An attorney shall not charge or collect a fee in connection with answering a request for investigation unless he or she is acting as counsel for a respondent in connection with a disciplinary investigation or proceeding.
- (C) Duty to Assist Administrator. An attorney other than a respondent or respondent’s attorney shall assist—cooperate with the administrator in the investigation, prosecution, and disposition of a request for investigation or ~~complaint~~ disciplinary proceeding filed with or by the administrator.

Staff comment: The proposed revisions in this rule would clarify that an attorney who represents a respondent may charge a fee, but attorneys otherwise would be precluded from charging a fee in connection with a disciplinary proceeding.

Rule 9.104 Grounds for Discipline in General; ~~Adjudication Elsewhere~~

| Alternative A (AGC Proposal)   | Alternative B (SBM Proposal)   |
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| <p>(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:</p> <p>(1) conduct prejudicial to the proper administration of justice;</p> <p>(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;</p> <p>(3) conduct that is contrary to justice, ethics, honesty, or good morals;</p> <p>(4) conduct that violates the standards or rules of professional <u>conduct responsibility</u> adopted by the Supreme Court;</p> <p>(5) conduct that violates a criminal law of a state or of the United States, <u>an ordinance, or tribal law pursuant to MCR 2.615</u>;</p> <p>(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;</p> <p>(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);</p> <p>(8) contempt of the board or a hearing panel;<del>or</del></p> | <p><del>(A)</del> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:</p> <p><del>(1) conduct prejudicial to the proper administration of justice;</del></p> <p><del>(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;</del></p> <p><del>(3) conduct that is contrary to justice, ethics, honesty, or good morals;</del></p> <p><del>(4)</del><u>(A)</u> conduct that violates the standards or rules of professional <del>responsibility</del> <u>conduct</u> adopted by the Supreme Court;</p> <p><del>(5) conduct that violates a criminal law of a state or of the United States;</del></p> <p><del>(6)</del><u>(B)</u> knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;</p> <p><del>(7)</del><u>(C)</u> failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);</p> <p><del>(8)</del><u>(D)</u> contempt of the board or a hearing panel; or</p> |

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| <p>(9) <u>violation of an order of discipline; or</u></p> <p>(10) <u>entering into an agreement or attempting to obtain an agreement, that:</u></p> <p>(a) <u>the professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the administrator;</u></p> <p>(b) <u>the plaintiff shall withdraw a request for investigation or shall not cooperate with the investigation or prosecution of misconduct by the administrator; or</u></p> <p>(c) <u>the record of any civil action for professional misconduct shall be sealed from review by the administrator.</u></p> <p>(B) <u>It is also misconduct and a ground for discipline if, through multiple acts and omissions, a lawyer demonstrates the absence of fitness to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. MCR 9.103(A). This is misconduct for which discipline can be imposed for the protection of the public, the courts, and the legal profession. MCR 9.105. In proceedings brought under this subrule, prior acts and omissions of the lawyer are admissible.</u></p> <p><del>(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state, or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether</del></p> | <p><del>(9)</del><u>(E)</u> <u>violation of an order of discipline.</u></p> <p><del>(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state, or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether</del></p> |
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| <del>imposition of identical discipline in Michigan would be clearly inappropriate.</del> | <del>imposition of identical discipline in Michigan would be clearly inappropriate.</del> |
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Staff comment: This rule is one area of significant difference between the AGC and the SBM. The SBM recommends restructuring the rule to limit misconduct to behavior that is misconduct as expressed in the Michigan Rules of Professional Conduct or behavior related to a discipline proceeding. The AGC proposal would retain as grounds for discipline various behaviors that are not expressly included in the Michigan Rules of Professional Conduct. In addition, the AGC proposal would insert two new concepts as grounds for misconduct: an attempt to encourage a client to settle a potential discipline proceeding, and a pattern of behaviors (acts and omissions) even if no discipline was imposed for those acts or omissions individually. The AGC and SBM explanations for their opposing proposals are outlined below.

AGC comment: In the AGC's proposed changes to MCR 9.104(A)(4), the wording has been changed to be in accord with the terminology of the Michigan Rules of Professional Conduct. The proposed change to MCR 9.104(5) reflects that misdemeanor convictions may enter based upon violations of local ordinance, including convictions where the defendant has abused substances such as drunk driving, disorderly conduct, and possession. Additionally, the change to the proposed rule would take cognizance of convictions entered in formalized tribal courts. MCR 9.104(A)(9) clarifies that lawyers may not obstruct justice or attempt to do so by obtaining or seeking an agreement to conceal alleged misconduct.

The Commission recommends inclusion of a new rule under MCR 9.104(B) allowing prior discipline to be charged in the formal complaint. The inclusion of a respondent's prior disciplinary record is to show a pattern of misconduct and goes to the overall issue of the fitness of a recidivist respondent.

MCR 9.104(B) would be moved to MCR 9.120 for purposes of organizational structure.

SBM Workgroup comment: Currently, both the Rules of Professional Conduct (8.4) and the Michigan Court Rules (9.104) articulate grounds for discipline; some provisions are substantially identical, some are distinctly different; and some could be interpreted as describing the same general grounds in different ways or describing different conduct. The Workgroup favors restricting 9.104 disciplinary grounds to those pertinent to the disciplinary process itself and otherwise referring to and relying exclusively upon grounds set forth in the Rules of Professional Conduct as the general basis for disciplinary action. As a result, the workgroup's version of 9.104 deletes the current paragraphs (A)(1), (2), (3), and (5).

The Workgroup rejected what is contained in the AGC Version as a new paragraph (10), believing that such restrictions were more appropriately placed, if at all, in MRPC 8.3 which deals with reporting misconduct. The Workgroup rejected the AGC-proposed habitual offender rule set forth in a new paragraph (B), believing that (1) the language about “multiple acts and omissions” is overbroad; (2) prior disciplinary history is already a mandatory part of the hearing panel’s decisionmaking process admissible at a hearing on sanctions under MCR 9.115(J); and (3) “prior acts and omissions” is overbroad in that those acts themselves are not limited to acts which constitute professional misconduct under any provision of the MRPC.

The AGC objects to the State Bar Workgroup’s proposed changes to MCR 9.104, other than moving MCR 9.104(B) to MCR 9.120. The proposed changes weaken the ability of the AGC to prosecute actions and would vitiate case precedent established by the Michigan Supreme Court, such as in *Grievance Adm’r v Fried*, 456 Mich. 234 (1997), in which the Court held: “The alleged conduct surely exposes the legal profession and the courts to contempt and ridicule—no reasonable person would approve a system in which one can obtain a more lenient judge (and, presumably, a more lenient sentence) in a criminal case by paying \$1,000 to a judge’s relative. The alleged conduct is contrary to justice, ethics, honesty, and good morals. It is wrong,” *Fried, id.* at 245. Omission of the provision may result in an inability to bring charges for conduct such as engaging in sexual relations with one’s own client. It should be noted that the MRPC does not have an outright ban against such activity although such a ban is included under the ABA’s Model Rules.

The proposed changes would substantively affect case law of the Court which confirmed that MCR 9.104(A)(5) allows for the prosecution for any criminal conviction. See *Grievance Adm’r v Deutch and Howell*, 455 Mich 149 (1997). See also *State Bar Grievance Administrator v Gillis*, 402 Mich 286 (1978).

#### Rule 9.105 Purpose and Funding of Disciplinary Proceedings

- (A) Purpose. Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse.
- (B) Funding. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. ~~Commissioners of the State Bar of Michigan may not represent respondents in proceedings before the board, including preliminary discussions with commission employees prior to the filing of a request for investigation.~~

## Rule 9.106 Types of Discipline; Minimum Discipline; ~~Admonishment~~

Misconduct is grounds for:

- (1) ~~revocation of the license to~~ disbarment of an attorney from the practice of law in Michigan;
- (2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;
- (3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;
- (4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or
- (5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline; ~~or~~
- ~~(6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.~~

Staff comment: The reference to admonishment in this rule would be moved to MCR 9.114 to emphasize that an admonishment is not discipline.

## Rule 9.107 Rules Exclusive on Discipline

- (A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

- (B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney, ~~but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney.~~

Staff comment: Local bar associations do not investigate alleged misconduct of an attorney, so the proposal would eliminate the language.

#### Rule 9.108 Attorney Grievance Commission

- (A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.
- (B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.
- (C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve ~~a full term~~ up to 2 more full terms.
- (D) Internal Rules.
- (1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.
  - (2) Five members constitute a quorum. The commission acts by majority vote of the members ~~present~~ participating in the meeting.
  - (3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.
  - (4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived

in writing or by attending the meeting. Special meetings may be conducted through electronic means.

(E) Powers and Duties. The commission has the power and duty to:

- (1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;
- (2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;
- (3) supervise the administrator ~~and his or her staff~~;
- (4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;
- (5) annually ~~write~~ propose a budget for the commission and the administrator's office, ~~(including compensation,)~~ and submit it to the Supreme Court for approval;
- (6) submit to the Supreme Court proposed changes in these rules;
- ~~(7) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Discipline Board that summarizes the activities of both agencies during the past year; and~~
- ~~(8)~~(7) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and
- ~~(9)~~(8) perform other duties provided in these rules.

Staff comment: The proposal would make primarily technical changes to the rule.

#### Rule 9.109 Grievance Administrator

- (A) Appointment. The administrator and the deputy administrator must be attorneys. The commission may ~~shall~~ recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

(B) Powers and Duties. The administrator has the power and duty to:

- (1) employ or retain attorneys, investigators, and staff with the approval of the commission;
- (2) supervise the attorneys, investigators, and staff;
- (3) assist the public in preparing requests for investigation;
- (4) maintain the commission records created as a result of these rules;
- (5) investigate alleged misconduct of attorneys, including ~~serving a request for~~ initiating an investigation in his or her own name if necessary;
- (6) prosecute complaints the commission authorizes;
- (7) prosecute or defend reviews and appeals as the commission authorizes; ~~and~~
- (8) report to the Supreme Court at least quarterly regarding the commission's activities, and to submit a joint annual report with the board that summarizes the activities of both agencies during the past year; and
- ~~(8)~~(9) perform other duties provided in these rules or assigned by the commission.

(C) Legal Counsel for the Administrator.

- (1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.
- (2) Legal counsel may
  - (a) ~~prepare and file complaints and notices of hearings~~ commence disciplinary proceedings by filing pleadings or notices;
  - (b) present evidence relating to ~~complaints or petitions for reinstatement~~ disciplinary and court proceedings;
  - (c) prepare and file arguments and briefs;
  - (d) inform the administrator about the progress of cases assigned; and
  - (e) perform other duties assigned by the administrator.

Staff comment: The proposal would make primarily technical changes to the rule.

#### Rule 9.110 Attorney Discipline Board

- (A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.
- (B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.
- (C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve two-a full terms.
- (D) Internal Rules.
  - (1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.
  - (2) Five members constitute a quorum. The board acts by a majority vote of the members present.
  - (3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.
  - (4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.
- (E) Powers and Duties. The board has the power and duty to:

- (1) appoint an attorney to serve as its general counsel and executive director;
- (2) appoint hearing panels, ~~and~~ masters, monitors, and mentors;
- (3) assign a ~~complaint~~ disciplinary proceeding to a hearing panel or to a master;
- (4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;
- (5) on request of the administrator or respondent, review a petition for leave to appeal and a petition for leave to review a nonfinal order;
- ~~(5)~~(6) discipline and reinstate attorneys under these rules and exercise continuing jurisdiction over orders of discipline and reinstatement;
- ~~(6)~~(7) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;
- ~~(7)~~(8) annually propose ~~write~~ a budget for the board and submit it to the Supreme Court for approval;
- ~~(8)~~(9) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Grievance Commission that summarizes the activities of both agencies during the past year; and
- ~~(9)~~(10) submit to the Supreme Court proposed changes in these rules.

Staff comment: The proposal would make various technical changes in the rule, and would introduce the concept of monitors and mentors that would be appointed by the board to oversee or assist an attorney. The proposal also would allow for an interlocutory-type appeal procedure.

#### Rule 9.111 Hearing Panels

- (A) Composition; Quorum. The board must establish hearing panels from a list of volunteer lawyers maintained by its executive director. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson, and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson, and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a

majority decision, the matter shall be referred to the board for reassignment to a new panel.

(B) Hearing Panelists or Masters; Discipline.

(1) An attorney shall not be appointed as a hearing panelist or master if he or she:

(a) has ever been the subject of an order that imposes discipline, or

(b) has been admonished or placed on contractual probation within the preceding 5 years.

(2) A hearing panelist or master who becomes the subject of an order imposing discipline, an admonition, or placement on contractual probation shall be removed from the roster of hearing panelists. A hearing panelist or master who becomes the subject of a formal discipline proceeding shall be removed from consideration of any pending matter; shall be placed on the ADB's roster of inactive panelists; and shall not be assigned to a panel until the formal discipline proceeding has been resolved. A hearing panelist or master who becomes the subject of an otherwise confidential request for investigation must disclose that investigation to the parties in the matter before the panelist or master, or must disqualify himself or herself from participation in the matter.

~~(B)~~(C) Powers and Duties. A hearing panel shall do the following:

~~(1) Hold-Schedule~~ a public hearing on a ~~complaint disciplinary proceeding, judgment of conviction, or reinstatement petition reciprocal discipline proceeding~~ assigned to it within 56 days after the ~~date the complaint is filed with the board or the date that notice of the reinstatement petition is published~~ matter is filed with the board. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) Receive evidence and make written findings of fact.

(3) Discipline and reinstate attorneys or dismiss a complaint by order; under these rules and exercise continuing jurisdiction over its orders of discipline and reinstatement.

- (4) Report its actions to the board within ~~28 days after the conclusion of a hearing~~ 35 days of the later of the filing of the transcript or the closing of the record, unless extended by the board chairperson.
- (5) Perform other duties provided in these rules.

Staff comment: The proposal would incorporate in the rule specific provisions regarding the circumstances under which an attorney subject to discipline could serve on a hearing panel. Time periods would be revised to account for preparation of transcripts, and conform to current practices.

#### Rule 9.112 Requests for Investigation

- (A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. ~~Forms must be available to the public through each state bar office and county clerk's office.~~ Use of the form is not required for filing a request for investigation.
- (B) Form of Request. A request for investigation of alleged misconduct must
  - (1) be in writing;
  - (2) describe the alleged misconduct, including the approximate time and place of it;
  - (3) be signed by the complainant; and
  - (4) be filed with the administrator.
- (C) Handling by Administrator.
  - (1) Request for Investigation of Attorney. After ~~making~~ a preliminary review ~~investigation~~, the administrator shall either
    - (a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or
    - (b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the ~~S~~state ~~B~~bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a

respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

- (2) Request for Investigation of Judge. The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.
- (3) Request for Investigation of Member or Employee of Commission or Board. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.

(D) Subpoenas.

- (1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning matters then under investigation. Upon request filed with the board, the board chairperson may quash or modify the subpoena if compliance would be unreasonable or oppressive. Documents or other tangible things so produced may be retained by the grievance administrator, copied, or may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.
- (2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding before the board chairperson or his or her designee, or under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred. In the event of a finding of contempt by the respondent, the respondent's license to practice law may be suspended until he or she complies with the order of the board chairperson or his or her designee.
- (3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena may utilize MCR

2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

- (4) Upon receipt of a subpoena certified to be duly issued under the rules or laws of another lawyer disciplinary or admissions jurisdiction, the administrator may issue a subpoena directing a person domiciled or found within the state of Michigan to give testimony and/or produce documents or other things for use in the other lawyer disciplinary proceedings as directed in the subpoena of the other jurisdiction. The practice and procedure applicable to subpoenas issued under this subdivision shall be that of the other jurisdiction, except that:
- (a) the testimony or production shall be only in the county where the person resides or is employed, or as otherwise fixed by the grievance administrator for good cause shown; and,
  - (b) compliance with any subpoena issued pursuant to this subdivision and contempt for failure in this respect shall be sought as elsewhere provided in this subchapter.

| Alternative A (AGC Proposal)   | Alternative B (SBM Proposal)   |
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| <p><u>(E) Access to Medical and Psychological Records.</u></p> <p><u>(1) After the request for investigation has been served on the respondent, and where there is a genuine issue as to a material fact concerning the physical, mental, or emotional condition of the respondent, the administrator may demand the respondent waive applicable privileges and permit the administrator access to existing records concerning the physical, mental, or emotional condition of the respondent. The release of information will take place in accordance with MCR 2.314(D).</u></p> <p><u>(2) Upon the conviction of an attorney, and upon the grievance administrator's request, the court shall</u></p> | <p>[The state bar did not submit proposed language in this subrule, opposes the AGC's proposed language in Alternative A, and would not publish it for comment.]</p> |

release to the grievance administrator a copy of any substance abuse assessments or psychological reports received by the probation department during the criminal action.

(3) After the request for investigation has been served on the respondent, and where it appears that the respondent is not fit to engage in the practice of law, the administrator may request the respondent to submit to one or more independent examinations by licensed professionals of the administrator's choosing, at the administrator's expense. Where the respondent complies with such a request, the respondent may also be further examined by one or more licensed professionals of the respondent's choosing, at the respondent's expense.

(4) When an examination is conducted pursuant to MCR 9.112(E)(3), the licensed professional must provide the administrator and the respondent with copies of the professional's report within 28 days. The report will include a copy of the professional's résumé, an account of the history obtained from the respondent, a description of administered tests and their results, a diagnosis, a prognosis, and recommendations regarding treatment.

(5) All records and reports gathered under MCR 9.112(E) are admissible for one year in disciplinary proceedings against the respondent and, after their admission into the record, shall be retained in camera.

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| <p><u>(6) When a respondent refuses to comply with a demand by the administrator under MCR 9.112(E)(1) or (2), in a case in which the administrator has initiated formal proceedings, the hearing panel shall review the evidence and all legitimate inferences regarding the relevant physical, mental, or emotional condition of the respondent in the light most favorable to the administrator.</u></p> |  |
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Staff comment: The first part of the proposed amendments of this rule would make primarily technical changes, and also would allow a respondent's license to practice to be suspended upon a finding of contempt by the board chairperson or designee. The proposal further would allow the administrator to issue a subpoena directing a person in Michigan to provide testimony or produce documents or other materials for use in another jurisdiction's lawyer disciplinary proceeding. Finally, the AGC recommends adoption of specific language providing for access to medical and psychological records and establishing a procedure under which the Grievance Administrator may request that the respondent submit to one or more independent medical examinations. If the respondent refuses to comply with the administrator's demand, the hearing panel would be required to review the evidence regarding the respondent's physical or mental health in a light most favorable to the administrator.

AGC comment: MCR 9.112(E) is proposed by the AGC because of issues of substance abuse, and mental disability affecting the competency of affected lawyers who may be representing the public. The amendment would allow the grievance administrator the opportunity to obtain information on underlying causes of alleged misconduct and whether the lawyer is currently fit to represent the public. Failure by a respondent to comply with a demand by the grievance administrator to provide medical or psychological information shall, in any subsequent disciplinary proceedings that may be filed following the refusal, result in an evidentiary inference concerning the refusal.

SBM Workgroup comment: The AGC version's proposed addition of paragraph (E) was wholly rejected by all members of the Workgroup other than the representatives from the AGC. The Workgroup believed that a "genuine issue as to a material fact" could be predicated upon simply a disagreement in pleadings between the allegations being made by the grievance administrator and the responsive pleading and that, given that there was no mechanism in the rule for contesting the language mandating a waiver of privilege or confidentiality associated with medical records based on the perceived "genuine issue as to a material fact," the AGC's proposal was draconian and could

readily result in an inappropriate abrogation of privacy rights in medical information. The Workgroup believes that it is improper to establish an irrebuttable inference about the respondent's physical, mental, or emotional condition as a necessary consequence of a refusal to comply with a demand made pursuant to paragraph (E) (1) or (2) when there is not elsewhere any mechanism for challenging the legitimacy of the demand. The Workgroup developed language spelling out a procedure for securing an independent medical examination, which is set forth in MCR 9.121(B)(1)(a).

#### Rule 9.113 Answer by Respondent

- (A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b) or such further time as permitted by the administrator, the respondent shall file with the administrator a ~~signed~~, written answer signed by respondent in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. ~~The administration may allow further time to answer.~~ Misrepresentation in the answer is grounds for discipline. Respondent's signature constitutes verification that he or she has read the document. The administrator shall provide a copy of the answer and any supporting documents, or documents related to a refusal to answer under MCR 9.113(B)(1), to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.
- (B) Refusal or Failure to Answer.
- (1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.
  - (2) The failure of a respondent to answer within the time period required under these rules other than as permitted in subrule (B)(1) or as further permitted by the administrator is misconduct. See MCR 9.104(A)(7).

| Alternative A (AGC Proposal)  | Alternative B (SBM Proposal)  |
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| <p>(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted <u>under seal to the board</u> <del>a hearing panel</del> for adjudication. <u>If the board finds that the refusal was not proper, it shall direct the attorney to answer the request for investigation within 21 days of its order. The board may order that the respondent's license shall be suspended until further</u></p> | <p>(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted <u>under seal to a hearing panel</u> for adjudication. <u>If a panel finds that the refusal was not proper, it shall direct the attorney to answer the request for investigation within 21 days of its order.</u></p> |

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| order if he or she does not file an answer to the request for investigation within the 21-day period. |  |
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(C) Attorney-Client Privilege. A person who files a request for investigation of an attorney irrevocably waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.

(D) Representation by Attorney. The respondent may be represented by an attorney.

Staff comment: The proposed changes in this rule would make primarily technical and clarifying updates. The alternative versions of subsection (B)(3) reflect the AGC's intent that the board adjudicate claims that a respondent failed to answer on constitutional grounds, while the SBM workgroup believes such decision should be made by a hearing panel. The AGC version also includes language that would allow the board to suspend an attorney's license for failure to file an answer to a request for investigation within 21 days.

#### Rule 9.114 Action by Administrator or Commission After Answer

(A) Action After Investigation. After an answer is filed or the time for filing an answer has expired, the administrator may ~~assign the matter for further investigation, including, if necessary, an informal hearing. When the investigation is complete, the administrator shall either~~

(1) dismiss the request for investigation and notify the complainant and the respondent of the reasons for the dismissal, ~~or~~

(2) conduct further investigation. Upon completion of the investigation, the grievance administrator shall refer the matter to the commission for its review. The commission may direct that a complaint be filed, that the file be closed request be dismissed, or that the respondent be admonished or placed on contractual probation with the respondent's consent, or

(3) close a file administratively where warranted under the circumstances.

(B) Admonition. With a respondent's consent, a respondent may be admonished by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential except as provided by this rule, MCR 9.115(J)(3) and by MCR 9.126(D)(4).

- (1) The administrator shall notify the respondent of the provisions of this rule by ordinary mail at the respondent's address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan, or as otherwise directed by respondent.
- (2) The respondent may, within 21 days of service of the admonition or such additional time as permitted by the administrator, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint. Failure of a respondent to object constitutes an acceptance.

| Alternative A (AGC Proposal)  | Alternative B (SBM Proposal)   |
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| <p>(3) <u>At the time an admonishment becomes effective, if a respondent is known to be employed (other than as a sole legal practitioner), the administrator shall send a copy of the admonishment to the respondent's employer by regular mail. Individual legal clients of the respondent, other than the complainant who initiated the investigation resulting in the admonishment, shall not be provided copies of the admonishment.</u></p> | <p>[The state bar did not submit proposed language in this subrule, opposes the AGC's proposed language, and would not include it in the published version.]</p> |

~~(B)~~(C) Contractual Probation. For purposes of this subrule, "contractual probation" means the placement of a consenting respondent on probation by the commission, without the filing of formal charges. Contractual probation does not constitute discipline, and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3).

- (1) If the commission finds that the alleged misconduct, if proven, would not result in disbarment or a substantial suspension ~~or revocation~~ of a respondent's license to practice law, the commission may defer disposition of the matter and place the respondent on contractual probation for a period not to exceed ~~two~~three years, provided the following criteria are met.
  - (a) the misconduct is significantly related to a respondent's substance abuse problem, of the respondent or mental or physical infirmity or disability,

- (b) the terms and conditions of the contractual probation, which shall include an appropriate period of treatment, are agreed upon by the commission grievance administrator and the respondent ~~prior to submission to the commission for consideration~~, and,
- (c) the commission determines that contractual probation is appropriate and in the best interests of the public, the courts, the legal profession, and the respondent.

(2) A contractual probation may include one or more of these requirements:

- (a) Periodic alcohol or drug testing.
- (b) Attendance at support-group or comparable meetings.
- (c) Professional counseling on a regular basis.
- (d) An initial written diagnosis and prognosis by the provider followed by quarterly verification of treatment by the provider as agreed upon by the commission and the respondent. The provider shall notify the commission of any failure to adhere to the treatment plan.

~~(2)~~(3) The respondent is responsible for any costs associated with the contractual probation and related treatment.

~~(3)~~(4) Upon written notice to the respondent and an opportunity to file written objections, the commission may terminate the contractual probation and file a complaint-disciplinary proceedings or take other appropriate action based on the misconduct, if

- (a) the respondent fails to satisfactorily complete the terms and conditions of the contractual probation, or
- (b) the commission concludes that the respondent has committed other misconduct that warrants the filing of a formal complaint.

~~(4)~~(5) The placing of a respondent on contractual probation shall constitute a final disposition that entitles the complainant to notice in accordance with MCR 9.114(D), and to file an action in accordance with MCR 9.122(A)(2).

~~(C)~~(D) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available

information about the respondent. Law enforcement officers are requested to comply promptly with each request.

(E) Assistance of Courts. If the grievance administrator determines that a non-public court file exists, including files on expunged convictions, and that it is relevant to a pending investigation concerning a respondent attorney, the administrator may request that a court release to the Attorney Grievance Commission the nonpublic court file. Courts are requested to comply promptly with each request.

~~(D)~~(F) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation ~~dismissed by the commission without a hearing before a hearing panel.~~

~~(E)~~(G) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:

(1) Where 3 years have passed from the conclusion of formal disciplinary action or the issuance of an admonishment, non-essential documents may be discarded.

~~(4)~~(2) The administrator may destroy the files or records relating to a closed or dismissed request for investigation ~~dismissed by the commission~~ after 3 years have elapsed from the date of dismissal or closing.

~~(2)~~(3) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or records after 3 years have 1 year has elapsed from the date when they were created or acquired by the commission.

Staff comment: The proposal regarding this rule includes various technical updates that would make the rule reflect current practice. Provisions related to admonishment would be inserted here. The AGC version includes notice of admonishment to the attorney's employer, while there is no such provision recommended by the SBM workgroup. The AGC version originally included a notice requirement only if the attorney was employed in a legal capacity by a firm, agency, or other organization, but the Court for purposes of publication revised the language to require notice to any employer, regardless of the attorney's type of work.

AGC comment: The AGC's proposed changes to paragraph (A) are made to reflect current practices. The amendment deletes language relating to "informal

hearings” as outmoded. The remainder of the changes to paragraph (A) reflect current terminology and practices at the AGC. Files that have been reviewed by the commission are closed rather than dismissed. Where a file is closed “with a caution,” that file is still closed but there is simply language added to the closing letter for educational purposes, only. The file remains a closed file.

It is the administrator, not the Commission, that sometimes will close a file administratively. This administrative closure may occur in instances where the respondent has died, or a file has been opened in error, etc. The amendments further reflect the stages of review in files where the attorney is required to file an answer.

Language pertaining to admonitions has been moved from MCR 9.106 to paragraph (B), consistent with the notion that an admonition is not a discipline. Language in paragraph (B)(1) was added to specify the means to be utilized in notifying a respondent of the admonition. If the requisite twenty-one days from notice elapses and the respondent does not object, paragraph (B)(2) specifies that silence constitutes an acceptance of the admonition. Finally, under added rule MCR 9.114(B)(3), a copy of the admonishment is to be sent to a respondent’s employer to enable the employer to conduct appropriate supervision.

Relettered paragraph (C) relating to contractual probation as proposed specifies some of the conditions that are currently included in standardized contractual probation agreements. The AGC also recommends more expansive language, enabling the AGC to offer contractual probation to attorneys who are at the beginning stage of a substance problem as well as those suffering from a mental or emotional disability. Because contractual probation is by consent, an attorney does not have to agree to it.

Paragraph (D) is renumbered from MCR 9.114(E). Paragraph (E) has been included to allow the administrator access to non-public files involving attorneys. Paragraph (F) as proposed reflects actual practice. Paragraph (G) allows the AGC to discard non-essential documents based upon certain time elements.

SBM Workgroup comment: The format of paragraphs (A)(1), (2), and (3) adopted by the Workgroup, including the last paragraph which sets apart closing a file administratively where warranted, were consistent with an earlier AGC draft, with the exception that the Workgroup rejected setting out “closed with a caution” as a separate category. The Workgroup believed that the existing category of options were sufficient without adding another type of dismissal. The Workgroup also found inappropriate the language directing that admonishments, which are confidential, be sent to a respondent’s “employer”. In a law firm setting, identifying who constitutes the “employer” might be difficult. Considering that an admonishment is not a “discipline” and does not impact or impair a lawyer’s ability to practice law, no meaningful purpose for notifying the employer exists other than simply “outing” the respondent.

Members of the Workgroup also expressed a belief that, where the grievance administrator believes an admonishment is the appropriate outcome in a given set of circumstances, a respondent's knowledge that his or her employer will be made aware of the admonishment might render settlement on that basis more difficult.

The reference in paragraph (B) to MCR 9.126(D)(4) is consistent with an earlier AGC draft. The current AGC version's reference to MCR 9.126 was not discussed with the Workgroup but likely would have been found workable.

The Workgroup specifically rejected the AGC's proposal to increase the maximum length of probation from two years to three years, which is set forth in relettered paragraph (C)(1).

There is no substantive distinction between the Workgroup and AGC versions of paragraph (G)(2). The Workgroup version presumes that any file that is dismissed will thereafter be closed, so that there is no reason to describe both categories separately.

#### Rule 9.115 Hearing Panel Procedure

- (A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.
- (B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and; a if the respondent's employer is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to proceed ~~prosecute~~, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed.
- (C) Service. Service of the complaint ~~and all subsequent pleadings and orders~~ and a default must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's

attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) ~~Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).~~ A respondent must serve and file a signed answer or take other action permitted by law or these rules within 21 days after being served with the complaint in the manner provided in MCR 9.115(C). A signature constitutes verification that the respondent has read the answer or other response.

(2) A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.

(E) Representation by an Attorney. The respondent may be represented by an attorney, who must enter an appearance, which has the same effect as an appearance under MCR 2.117.

(F) Prehearing Procedure.

(1) Extensions. If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

(2) Motion to Disqualify.

(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member of the hearing panel shall disclose in a writing filed with the board any information that the member believes could be grounds for disqualification under the guidelines of MCR 2.003(B)(C), including pending requests for investigation filed against the member. The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party and each panel member.

- (b) ~~Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel. A motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the hearing date, the motion must be made forthwith. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. All known grounds for disqualification must be included at the time the motion is filed. An affidavit must accompany the motion.~~ The board chairperson shall decide the motion under the guidelines of MCR 2.003.
  - (c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.
- (3) Amendment of Pleadings. The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.
- (4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:
  - (a) Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days ~~of~~ after the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

~~(b)~~(i) Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness at the hearing. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.

(ii) Within 21 days following the filing of an answer, the administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) nonprivileged information and evidence relevant to the charges against the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.

~~Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.~~

~~(b)~~(e) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good cause shown, the hearing panel may allow the parties to depose other witnesses.

~~(c)(4)~~ The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

- (5) Discipline by Consent. A respondent may offer to plead ~~nolo contendere~~ no contest or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline that includes all prior discipline, admonishments, and contractual probations, if any, and file the stipulation with the hearing panel. If the stipulation contains any nonpublic information, it shall be filed in camera. ~~At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant.~~ If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.
- (G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221. Notwithstanding MRE 615, there shall be a presumption that a complainant is entitled to be present during a hearing, which may only be overcome upon a finding by the panel, supported by facts which are

particular to the proceeding, that testimony by the complainant is likely to be materially affected by exposure to other testimony at the hearing.

- (H) Respondent's Appearance. The respondent shall personally appear at the hearing, unless excused by the panel, and is subject to cross-examination as an opposite party under MCL 600.2161.

(1) Where satisfactory proofs are entered into the record that a respondent possessed actual notice of the proceedings, but who still failed to appear, a panel shall suspend him or her effective 7 days from the date of entry of the order and until further order of the panel or the board.

(2) If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may, effective immediately, suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

- (I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(3) Upon a showing of good cause by a party, a panel may permit a witness to testify by telephonic, voice, or video conferencing.

- (J) Decision.

- (1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined, ~~or admonished, or placed on contractual probation.~~
  - (2) Upon a finding of misconduct, the hearing panel shall conduct a separate sanction hearing to determine the appropriate discipline. The sanction hearing ~~on discipline~~ shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established.
  - (3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. The discipline ordered may be concurrent or consecutive to other discipline. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including, but not limited to, records of the board, previous admonitions ~~and orders of discipline~~, and the previous placement of the respondent on contractual probation.
  - (4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.
  - (5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.
- (K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the discipline order. Once granted, a stay remains effective until the further order of the board.

- (L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.
- (M) Resignation by Respondent; Admission of Charges. An attorney's ~~request that his or her name be stricken from the official register of attorneys~~ resignation may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of disbarment ~~revocation~~.

Staff comment: Many of the changes proposed in this rule would clarify and update the rule to reflect current practices. The main point of division between the AGC and the SBM workgroup relates to language that occurs in subdivision (F)(4)(b)(2), which would expand the scope of discovery in discipline proceedings. Their comments follow.

AGC comment: The SBM Workgroup proposes a change to paragraph (F)(4)(b)(ii), which would enable respondents to essentially invade AGC files and records. The AGC recommends that no changes be made to the existing rule. Essentially, under this proposed rule, every part of the Commission's file would arguably be accessible. If the SBM version were adopted, each disciplinary proceeding has the potential to result in a discovery battle, with the board deciding whether or not the confidential files and memoranda of its sister agency should be invaded and disclosed to respondents under its subsection (2) "other material upon good cause shown to the chair of the hearing panel." Adoption of the provision proposed by the SBM Workgroup would constitute a *substantive* change to precedent set by this court. See, *Grievance Adm'r v Attorney Discipline Board Tri-County Hearing Panel No. 69*, 447 Mich 1203 (1994), *Grievance Adm'r v Attorney Discipline Bd.*, 444 Mich.1218 (1994), *Anonymous v Atty Grievance Comm'n*, 430 Mich 241, 255, (1988).

SBM Workgroup comment: All members of the Workgroup other than the AGC representatives favored expanding discovery beyond simply the exchange of witness names and addresses and a narrowly defined category of witness statements. Particularly absent a requirement upon the grievance administrator to divulge exculpatory material, the lack of any mechanism requiring the identification of persons with knowledge of relevant facts and production of non-privileged, relevant documentation places respondents in the position of receiving differing levels of information depending upon the personal preferences of the grievance administrator attorney assigned the case. Moreover, nationally Michigan is one of the most restrictive states in affording discovery to respondents in disciplinary proceeding. The modest expansion of discovery procedure set forth in proposed paragraph (F)(4)(b)(ii) would require identification of persons with knowledge of relevant facts and that a party respond to reasonable requests for non-privileged information and evidence relevant to the charges against the respondent and for other material upon good cause shown to the chair of the hearing panel.

The AGC version reverts to the current language, which in operation permits the grievance administrator attorney to defeat a respondent's ability to obtain information about a witness's anticipated testimony by simply not having the witness write anything down. The Workgroup does not believe the proposed changes would result in a discovery battle in every case and it goes without saying that a former precedent upholding the language currently in place would no longer have application once the new rule is in place.

The "for good cause shown" language contained in the AGC's version of paragraph (H) was not presented to or discussed by the Workgroup.

**Rule 9.116 Judges; Former Judges ~~Hearing Procedure; Judges other than Magistrates and Referees~~**

- (A) ~~Application of this Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee.~~
- (B) ~~Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board.~~
- (C) ~~Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later than 21 days after the complaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.~~
- (D) ~~Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.~~
- (E) ~~Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.~~

- (1) ~~If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.~~
  - (2) ~~If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent.~~
  - (3) ~~If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules.~~
- (F) ~~Appeal. The respondent judge may file a petition for review under MCR 9.118.~~
- (A) Judges. The administrator or commission may not take action against an incumbent judge, except that this rule does not prohibit an action by the administrator or commission against:
- (1) a magistrate or referee for misconduct unrelated to judicial functions, whether before or during the period when the person serves as a magistrate or referee; or
  - (2) a visiting judge as provided in MCR 9.203(E). If the Judicial Tenure Commission receives a request for investigation of a magistrate or referee or visiting judge arising from the practice of law, the Judicial Tenure Commission shall refer the matter to the administrator or commission for investigation in the first instance. If the administrator or the commission dismisses the request for investigation referred by the Judicial Tenure Commission, or a request for investigation of a magistrate, referee or visiting judge submitted directly to the commission by a complainant, the administrator or commission shall notify the Judicial Tenure Commission, which may take action as it deems appropriate.
- (B) Former Judges. The administrator or commission may take action against a former judge for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court. The administrator or commission may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.207(B)(1)-(5).

- (C) Judicial Tenure Commission Record. The record of the Judicial Tenure Commission proceeding is admissible at a hearing involving a former judge. The administrator or the respondent may introduce additional evidence.

Staff comment: Because it seemed that there may be situations in which the administrator or the commission could act under this rule, the Court published for comment a version that included reference to action by the administrator or the commission. Generally, the amendment would clarify the situations in which the commission could commence an investigation, and when the Judicial Tenure Commission action would take precedence.

AGC comment: The proposed changes to MCR 9.116 delineates that the administrator has jurisdiction to investigate and prosecute magistrates and visiting judges for conduct unrelated to the judicial function. The administrator will no longer have concurrent jurisdiction to discipline sitting judges disciplined by the Judicial Tenure Commission (JTC). If a judge has been removed, however, the proposed rule change states that the record of the JTC shall be admitted into the record, which is done to avoid duplication of evidence and unnecessary expenditure of resources.

SBM Workgroup comment: The distinctions between the Workgroup version and the AGC version are minor. The Workgroup version is identical to what the AGC proposed in its original draft. The AGC's later draft substitutes the word "administrator" for "commission" in a number of places, in apparent recognition that the grievance administrator would be the entity undertaking investigation. This is likely a change that, had it been presented to the Workgroup, the Workgroup likely would not have opposed. The substitution of "unrelated to judicial functions" in place of "arising from the practice of law" in paragraph (A)(1) would also probably have been approved by the Workgroup had the AGC presented it. The change to paragraph (C) seems to mandate introduction of the Judicial Tenure Commission proceeding rather than simply paving the way for its introduction by declaring it admissible. This change was also not presented by the AGC to the Workgroup.

#### Rule 9.118 Review of Order of Hearing Panel

- (A) Review of Order; Time.

- (1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.113(B), 9.115, 9.116, 9.120, 9.121, or 9.124. The administrator or the respondent may also petition the board for leave to appeal. Upon leave granted, the administrator or the respondent may petition the board to review a nonfinal order. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board

within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.

- (2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.
  - (3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted.
- (B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.
- (C) Hearing.
- (1) A hearing on the order to show cause must be heard by a subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).
  - (2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and shall make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a

copy of the report must be served as an original report and order of a hearing panel.

- (D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 28 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier.
- (E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. ~~The board may grant a stay pending its decision on a motion for reconsideration.~~ If the discipline order is a suspension for 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a motion for reconsideration. If the discipline is greater than a 179-day suspension, the respondent may petition for a stay. If the board grants a stay, the stay remains effective for 28 days after the board enters its order granting or denying reconsideration. ~~In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.~~
- (F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

Staff comment: The proposed amendments of this rule would allow the administrator or petitioner to seek review of a nonfinal order, and would implement an automatic stay if a motion for reconsideration is filed for a case in which the order of discipline includes a suspension of less than 180 days, which is consistent with MCR 9.122(C).

#### Rule 9.119 Conduct of Disbarred, Suspended, or Inactive Attorneys

- (A) Notification to Clients. An attorney ~~whose license is revoked or suspended,~~ who has resigned under Rule 3 of the Rules Concerning the State Bar of Michigan, or been disbarred, or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, resignation, the transfer to inactive status, or the nondisciplinary suspension, notify all ~~of~~ his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:

- (1) the nature and duration of the discipline imposed, the transfer to inactive status, the nondisciplinary suspension, or the resignation;
  - (2) the effective date of such discipline, transfer to inactive status, nondisciplinary suspension, or resignation;
  - (3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, nondisciplinary suspension, or resignation;
  - (4) the location and identity of the custodian of the clients' files and records, which will be made available to them or to substitute counsel;
  - (5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended, ~~or~~ inactive, or resigned attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;
  - (6) the address to which all correspondence to the attorney may be addressed.
- (B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of ~~revocation~~ disbarment, suspension, ~~or~~ transfer to inactive status, or resignation, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all parties a notice of the attorney's disqualification from the practice of law. The affected attorney shall either file a motion to withdraw from the representation, or, with the client's knowledge and consent, a substitution of counsel.
- (C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of ~~revocation~~ disbarment, suspension, ~~resignation~~, ~~or~~ transfer to inactive status pursuant to MCR 9.121, or resignation, the disbarred, suspended, ~~or~~ inactive, or resigned attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. The affidavit must set forth any claim by the affected attorney that he or she does not have active clients at the time of the effective date of the change in status. A disbarred, suspended, ~~or~~ inactive, or resigned attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

- (D) **Conduct After Entry of Order Prior to Effective Date.** A disbarred or suspended attorney, after entry of the order of ~~revocation~~ disbarment or suspension and prior to its effective date, shall not accept any new retainer or engagement as an attorney for another in any new case or legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.
- (E) **Conduct After Effective Date of Order.** An attorney who is disbarred, ~~or~~ suspended, ~~or who is~~ transferred to inactive status pursuant to MCR 9.121, ~~or who resigns~~ is, during the period of disbarment, suspension, or inactivity, or from and after the date of resignation, forbidden from:
- (1) practicing law in any form;
  - (2) having contact either in person, by telephone, or by electronic means, with clients or potential clients of a lawyer or law firm either as a paralegal, law clerk, legal assistant, or lawyer;
  - (23) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and
  - (34) holding himself or herself out as an attorney by any means.
- (F) **Compensation of Disbarred, Suspended, Resigned, or Inactive Attorney.** An attorney ~~whose license is revoked~~ who has been disbarred or suspended, has resigned, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, resigned, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the ~~revocation~~, disbarment, suspension, resignation, or transfer to inactive status.
- (G) **~~Inventory~~ Receivership.**
- (1) Attorney with a firm. If ~~the an~~ attorney ~~whose license~~ who is a member of a firm is ~~revoked~~ disbarred, ~~or~~ suspended, ~~or who is~~ transferred to inactive status pursuant to MCR 9.121, or resigns his or her license to practice law ~~was a member of a firm~~, the firm may continue to represent each client with

the client's express written consent. Copies of the signed consents shall be maintained with the client file.

- (2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, or dies, and there is no partner, executor, or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to act as a receiver with necessary powers, including:
- (a) To obtain and inventory the attorney's files;
  - (b) ~~and to~~ To take any action necessary to protect the interests of the attorney and the attorney's clients;
  - (c) To change the address at which the attorney's mail is delivered and to open the mail; or
  - (d) To secure (garner) the lawyer's bank accounts.

~~The person appointed may not disclose any information contained in any inventoried file without the client's written consent.~~ The person appointed is analogous to a receiver operating under the direction of the circuit court.

- (3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.
- (4) Publication of Notice. Upon receipt of notification from the receiver, the state bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.

Staff comment: The proposed changes in this rule would make technical revisions, update the rule to include resignation, and clarify how disbarred, inactive, or resigned attorneys must proceed. The original proposal would have required all requests for appointment of a receiver to be made with the local probate court, but because the probate court would not seem to have jurisdiction in cases where the attorney is imprisoned or simply resigns or becomes inactive, the Court approved a version for publication that retains the current jurisdiction for such appointment in circuit court. Further, because it is typically the Legislature and not the Court that determines filing fee requirements, the AGC's request for a blanket waiver of filing fees and other costs in

these types of cases (regardless of the financial situation of the case) was not included in the published version.

#### Rule 9.120 Conviction of Criminal Offense; Reciprocal Discipline

##### (A) Notification of the Grievance Administrator and the Attorney Discipline Board

- (1) When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.
- (2) A lawyer who has been the subject of an order of discipline or transferred to inactive status by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any state or territory of the United States or of the District of Columbia, or who has resigned from the bar or roster of attorneys in lieu of discipline by, or during the pendency of, discipline proceedings before such court or body shall inform the grievance administrator and board of entry of such order, transfer, or resignation within 14 days of the entry of the order, transfer, or resignation.

##### (B) ~~Suspension:~~ Criminal Conviction.

- (1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.
- (2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.
- (3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615. The

board shall then order the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).

~~(C)(4) Pardon; Conviction reversed.~~ On a pardon the board may, and on a reversal of the conviction the board must, by order filed and served under MCR 9.118(E)(F), vacate the ~~suspension order of discipline~~. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct, which had led to the criminal charge.

(C) Reciprocal Discipline.

(1) A certified copy of a final adjudication by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or a federal administrative agency, determining that an attorney, whether or not admitted in that jurisdiction, has committed misconduct or has been transferred to disability inactive status, shall establish conclusively the misconduct or the disability for purposes of a proceeding under subchapter 9.120 of these rules and comparable discipline or transfer shall be imposed in the Michigan proceeding unless the respondent was not afforded due process of law in the course of the original proceedings, the imposition of comparable discipline or transfer in Michigan would be clearly inappropriate, or the reason for the original transfer to disability inactive status no longer exists.

(2) Upon the filing by the grievance administrator of a certified copy of final adjudication described in paragraph (C)(1) with the board, the board shall issue an order directed to the lawyer and the administrator:

(a) attaching a copy of the order from the other jurisdiction; and

(b) directing, that, within 21 days from service of the order, the lawyer and administrator shall inform the board (i) of any objection to the imposition of comparable discipline or disability inactive status in Michigan based on the grounds set forth in paragraph (C)(1) of this rule, and (ii) whether a hearing is requested.

- (3) Upon receipt of an objection to the imposition of comparable discipline or disability inactive status raising one or more of the issues identified in paragraph (C)(1) of this rule, the board shall assign the matter to a hearing panel for disposition. The opposing party shall have 21 days to reply to an objection. If a hearing is requested, and the hearing panel grants the request, the hearing shall be held in accordance with the procedures set forth in MCR 9.115 except as otherwise provided in this rule.
- (4) Papers filed under this rule shall conform as nearly as practicable to the requirements of subchapter 2.100 and shall be filed with the board and served on the opposing party and each member of the hearing panel once assigned.
- (5) The burden is on the party seeking to avoid the imposition of comparable discipline or transfer to disability inactive status to demonstrate that it is not appropriate for one or more of the grounds set forth in paragraph (C)(1). “Comparable” discipline does not mean that the dates of a period of disqualification from practice in this state must coincide with the dates of the period of disqualification, if any, in the original jurisdiction.
- (6) If the 21-day period discussed in paragraph (C)(2)(b) has expired without objection by either party, the respondent is in default, with the same effect as a default in a civil action, and the board shall impose comparable discipline or transfer to disability inactive status unless it appears that one of the grounds set forth in paragraph (C)(1) of this rule requires a different result, in which case the board shall schedule a hearing in accord with paragraph (3) of this rule. An order entered pursuant to this subparagraph may be set aside if the requirements of MCR 2.603(D) are established.
- (7) In the event the discipline or transfer to disability inactive status imposed in the original jurisdiction is stayed, any reciprocal discipline imposed in Michigan shall be deferred until the stay expires.

Staff comment: In this rule, the AGC recommends technical revisions, as well as insertion of procedures relating to reciprocal discipline, which reflect an expansion and clarification of the procedure currently set out in MCR 9.104(B).

#### Rule 9.121 Attorney Declared to be Incompetent or Alleged to be Incapacitated or Asserting Impaired Ability

- (A) Adjudication by Court. If an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the board, on proper proof of the fact, must enter an order effective immediately transferring

the attorney to inactive status for an indefinite period and until further order of the board.

(B) Allegations of Incompetency or Incapacity.

- (1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, ~~including an examination of the attorney by qualified medical experts the board designates.~~

| Alternative A (AGC Proposal)   | Alternative B (SBM Proposal)  |
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| <p>(a) <u>Independent examination.</u></p> <p>(i) <u>Upon demand by the administrator or pursuant to an order of a panel, a respondent may be required to submit to one or more medical examination(s) or psychological examination(s) by board-certified or other licensed professionals. Within 30 days of the conclusion of the examination and testing, the medical examiner shall prepare a report which includes:</u></p> <p>(A) <u>the expert's resume or curriculum vitae;</u></p> <p>(B) <u>a statement of facts, and a list of the tests which were administered and the test results;</u></p> <p>(C) <u>a diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and</u></p> <p>(D) <u>no physician-patient privilege shall apply under this rule.</u></p> | <p>(a) <u>Examination.</u></p> <p>(i) <u>Upon a showing of good cause that a mental or physical condition is the basis of respondent's incompetency or incapacity as alleged in a complaint by the administrator, a hearing panel may order respondent to submit to one or more medical examination(s) or psychological examination(s) that are relevant to a condition of respondent shown to be in controversy.</u></p> |
| (ii) <u>The independent medical examiner</u>   | (ii) <u>If testing is ordered, the</u>  |

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| <p><u>shall provide the report to the panel, the administrator and the respondent. The report shall be admissible into evidence in the proceedings.</u></p> <p><u>(iii) The respondent is entitled to be examined by a qualified professional at his or her own expense, but such examiner shall prepare a report in accord with this rule. The respondent shall provide a copy of the report to the administrator within 30 days of the date of its preparation. Failure to provide a timely copy of the report to the grievance administrator shall result in the inability of the respondent to offer the report into evidence at any subsequent formal disciplinary proceeding. The report is otherwise admissible into the record.</u></p> | <p><u>administrator and respondent may stipulate to the expert(s) who will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings, subject to relevancy objections.</u></p> <p><u>(iii) If the administrator and/or respondent hire their own expert(s) to conduct the examination(s), the expert(s) will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. A report prepared pursuant to this paragraph is only admissible as substantive evidence upon stipulation by both parties. The respondent will be responsible for the expenses incurred by retaining his or her examiner.</u></p> <p><u>(iv) On its own motion or on the motion of either party, the hearing panel may appoint an expert of its own selection to conduct the necessary examination(s). The expert so appointed will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings unless, within 14 days of delivery of the report, a party objects, in which case either party may subpoena the expert to testify at the hearing at that party's expense.</u></p> <p><u>(b) Expert's Report</u></p> |
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| <p>(2) <del>The hearing panel shall</del> <u>When the administrator files a petition to transfer provide notice to the an attorney of the proceedings and appoint an attorney to represent him or her if he or she is without representation</u> <u>to inactive status, the petition shall be served on respondent according to the provisions of MCR 9.115(C).</u></p> <p>(3) <u>Upon the request of a party, or on its own motion, and following a finding of good cause, a panel may recommend the appointment of counsel by the board to represent the respondent if he or she is without representation.</u></p> <p>(34) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and</p> | <p><u>The expert's report as required by paragraph (a) shall include:</u></p> <p>(i) <u>the expert's resume or curriculum vitae;</u></p> <p>(ii) <u>a statement of facts, and a list of the tests which were administered and the test results;</u></p> <p>(iii) <u>a diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and</u></p> <p>(iv) <u>no physician-patient privilege shall apply under this rule.</u></p> <p>(2) The hearing panel shall provide notice to the attorney of the proceedings and appoint an attorney to represent him or her if he or she is without representation.</p> <p>(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and</p> |
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| <p>until further order of the board.</p> <p>(45) Pending disciplinary proceedings against the attorney <u>shall be administratively closed without prejudice to future prosecution upon the return of the lawyer to active status</u> <del>must be held in abeyance.</del></p> <p>(56) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.</p> | <p>until further order of the board.</p> <p>(4) Pending disciplinary proceedings against the attorney must be held in abeyance.</p> <p>(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.</p> |
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(C) Assertion of Impaired Ability; Probation.

- (1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that
  - (a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,
  - (b) the impairment was the cause of or substantially contributed to that conduct,
  - (c) the cause of the impairment is susceptible to treatment, and
  - (d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 3 ~~2~~—years if it specifically finds that an order of probation is not contrary to the public interest.
- (2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination ~~by a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician patient privilege shall apply under this rule. The~~

~~respondent's attorney may be present at an examination.~~ in accord with the procedure set forth in MCR 9.121(B)(1)(a). The panel may direct that the expense of the examination be paid by the respondent. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.

- (3) The probation order ~~may~~
  - (a) must specify the treatment the respondent is to undergo,
  - (b) may require the respondent to practice law only under the direct supervision of other attorneys, or
  - (c) may include any other terms the evidence shows are likely to eliminate the impairment without subjecting the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.
- (4) A respondent may be placed on probation for up to 3 years. The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed ~~2~~ 3 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.
- (5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.
- (D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.
- (E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by ~~the board~~ a panel on a showing by clear and convincing evidence that the attorney's disability has been removed and that he or she is fit to resume the practice of law. ~~The board~~ A panel may take the action necessary to determine whether the attorney's disability has

been removed, including an examination of the attorney ~~by qualified medical experts that the board designates~~ conducted in accord with the procedure set forth in MCR 9.121(B)(1)(a). The ~~board~~ panel may direct that the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, ~~the board~~ a panel may dispense with further evidence that the disability has been removed and may order reinstatement to active status on terms it finds proper and advisable, including recertification.

- (F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to ~~the board~~ a panel written consent for each to divulge whatever information and records are requested by the ~~board's~~ panel's medical or psychological experts.

AGC comment: Paragraph (B) has been expanded to add particulars about a medical examination that can either be demanded by the grievance administrator or ordered by a hearing panel in a proceeding brought by the grievance administrator alleging incapacity of the respondent. The proposed new language details the necessity of obtaining a medical report, the content of the report, and that it becomes part of the record. A respondent may also obtain such a report and, provided that it is properly served upon the administrator, it is admissible into the record. A new paragraph (B)(2) specifies how the respondent shall be served with the petition by referencing MCR 9.115(C). Changes to paragraph (B)(3) would require a finding of good cause after a request by a party or a hearing panel acting on its own motion in order for a hearing panel to recommend to the attorney discipline board the appointment of a lawyer to represent an unrepresented respondent in a proceeding brought under this rule.

Modifications to paragraph (B)(5) reflect current terminology and procedure.

Changes to paragraph (C)(2) provide that examinations are to be conducted in accordance with the new proposed provisions of paragraph (B)(1)(a). A provision allowing the presence of a respondent's counsel during an examination has been deleted. Paragraph (C)(4) has been changed to expand the initial term of probation from a maximum of two to a period of up to three years. Paragraph (C)(3) has been modified to clarify that the probation order must specify the treatment the respondent is to undergo. The remaining subparagraphs (b) and (c) remain discretionary.

Paragraph (E) has been changed to clarify that reinstatement proceedings pertaining to lawyers transferred to inactive status under this rule are heard by a hearing

panel and that examinations sought in a reinstatement proceeding will be handled in accordance with paragraph (B)(1). Consistent with these changes, references to “board” are changed to “panel” in paragraph (F). Also in paragraph (F), a reference to medical experts is modified with the addition of “or psychological” before “experts.”

SBM Workgroup comment: All members of the Workgroup other than the AGC representatives concur about the SBM version of paragraph (B)(1) that is proposed. The Workgroup majority believe that good cause ought to have to be shown before the administrator can obtain a hearing panel’s order that a respondent submit to one or more medical examinations. Paragraphs (B)(1)(a)(ii), (iii), and (iv) address circumstances where the administrator and respondent concur on the selection of the expert to conduct the examination, where each party selects his or her own, and where the hearing panel selects its own. The Workgroup version retains unaltered the provision appointing an unrepresented respondent (paragraph (B)(1)(b)[2]), the provision holding pending disciplinary proceeding in abeyance (paragraph (B)(1)(b)[4]) and the language providing a 2-year maximum for a period of probation (paragraph (C)[4]), all of which are consistent with current practice.

#### Rule 9.122 Review by Supreme Court

##### (A) Kinds Available; Time for Filing.

- (1) A party aggrieved, including the ~~person who made a request for investigation~~ complainant, by a final order of ~~discipline or dismissal~~ entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 28 days after the board enters its order granting or denying reconsideration.
- (2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.304.

##### (B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal.

##### (C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective ~~until~~ for 21 days following the conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

- (D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.
- (E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

Staff comment: The proposed changes in this rule would make primarily technical updates to the current language.

#### Rule 9.123 Eligibility for Reinstatement

- (A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A materially false statement contained in the affidavit is ground for disbarment.
- (B) ~~Revocation-Disbarment~~ or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:
  - (1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;
  - (2) the term of the suspension ordered has elapsed or 5 years have elapsed since his or her revocation of the license disbarment or resignation;
  - (3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or ~~revocation~~ disbarment;
  - (4) he or she has complied fully with the order of discipline;
  - (5) his or her conduct since the order of discipline has been exemplary and above reproach;

- (6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;
  - (7) taking into account all of the attorney's past conduct, including the nature of the misconduct that led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;
  - (8) he or she is in compliance with the requirements of subrule (C), if applicable; and
  - (9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for ~~revocation~~ vacating an order of a-reinstatement.
- (C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.
- (D) Petition for Reinstatement; Filing Limitations.
- (1) Except as provided in subrule (D)(3), an attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.
  - (2) An attorney whose license to practice law has been revoked or who has resigned may not file a petition for reinstatement until 5 years have elapsed since ~~revocation of the license~~ the attorney's resignation or disbarment.
  - (3) An attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, including any period of parole.

- (4) An attorney ~~whose license to practice law has been revoked~~ who has been disbarred or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least ~~180 days~~ 1 year from the effective date of the most recent hearing panel order granting or denying reinstatement.

Staff comment: The proposed changes are primarily technical updates. However, the AGC recommends that under paragraph (D)(4) the period between filing reinstatement petitions be increased to one year for reasons of administrative economy and to ensure that the applicant for reinstatement has time outside of any supervision in order to provide an appropriate track record for a panel's review. The SBM workgroup would prefer that the time period in (D)(4) remain at 180 days.

#### Rule 9.124 Procedure for Reinstatement

- (A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and the commission.
- (B) Petitioner's Responsibilities.
- (1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. ~~The following information affidavit must be attached to or contained in the affidavit~~ the following information:
- (a) every residence address since the date of disqualification from the practice of law;
  - (b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner's personnel file from the employer;
  - (c) a copy of a current driver's license;
  - (d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;

- (e) bank account statements, from the date of disqualification until the filing of the petition for reinstatement, for each and every bank account in which petitioner is named in any capacity;
- (f) copies of the petitioner's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest, and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;
- (g) any and all professional or occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;
- (h) any and all names used by petitioner since the time of disqualification;
- (i) petitioner's place and date of birth;
- (j) petitioner's social security number;
- (k) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which the ~~such~~ case occurred;
- (l) whether the petitioner was a party to any civil case, including the title, docket number, and court in which such case was filed; the petitioner must provide copies of the complaints and any dispositional orders or judgments, including settlement agreements, in such cases;
- (m) whether the petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case was filed; the petitioner must provide copies of the indictments or complaints and any dispositional orders or judgments of conviction in cases in which the petitioner was a defendant;
- (n) whether the petitioner was subject to treatment or counseling for mental or emotional impairments, or for substance abuse or

gambling addictions since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth an evaluative conclusion regarding the petitioner's impairment(s), the petitioner's treatment records, and prognosis for recovery.

- (2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and service on the administrator of the personal history affidavit, remit
    - (a) to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.
    - (b) to the board the basic administrative costs required under MCR 9.128(B)(1)
      - (i) an administrative cost of \$750 where the discipline imposed was a suspension of less than 3 years;
      - (ii) an administrative cost of \$1,500 where the discipline imposed was a suspension of 3 years or more or disbarment.
  - (3) If the petition is facially sufficient and the petitioner has provided proof of service of the personal history affidavit upon the administrator and paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice, on its own motion or the motion of the administrator.
  - (4) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and serve upon the administrator an updated personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners remain under a continuing obligation to provide updated information bearing upon the petition or the personal history affidavit.
  - (5) The petitioner must cooperate fully in the investigation by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for reinstatement.
- (C) Administrator's Responsibilities.

- (1) Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement.
- (2) The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner.
  - (a) For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing.
  - (b) The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is part of the record but does not restrict the parties in the presentation of additional relevant evidence at the hearing. Any evidence omitted from the report or received by the administrator ~~subsequent to~~ after the filing of the report must be disclosed promptly to the hearing panel and ~~the petitioner~~ to the opposing party.
- (D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to conditions that are relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F).

- (E) Review. Review is available under the rules governing review of other hearing panel orders. The administrator may request a stay of an order granting eligibility for reinstatement.

Staff comment: The amendments proposed in this rule are primarily technical and clarifying ones. But according to the AGC, the proposed change to paragraph (E), would effect a substantive change to case law. In *Probert v Michigan Attorney Discipline Board*, SC #70448 (December 29, 1982), the Court acted on a mandamus complaint filed by a petitioner seeking reinstatement whose reinstatement had been stayed by the board at the request of the administrator. The Court vacated the board's order, holding that it was without authority to issue a stay. The proposed change would grant such authority.

#### Rule 9.125 Immunity

A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, masters, receivers appointed under MCR 9.119(G), voluntary investigators, fee arbitrators, mentors, practice monitors, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.

A medical or psychological expert who administers testing or provides a report pursuant to MCR 9.114(C) or MCR 9.121 is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or formal disciplinary proceeding.

Staff comment: As described by the AGC and SBM, "the intention of the changes is to expand the application of the existing immunity rule to regular and periodic nonparty participants in the process who should be afforded immunity for their roles." See jointly-submitted side-by-side chart provided by the AGC and SBM.

#### Rule 9.126 Open Hearings; Privileged, Confidential Files and Records

- (A) Investigations. Except as provided in these rules, investigations by the administrator or the staff are privileged from disclosure, confidential, and may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's answer thereto if a ~~formal complaint~~ disciplinary proceeding has been filed.
- (B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.

- (C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public. A personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document that is not open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)~~(7)~~(8) or (E)~~(5)~~(8).
- (D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except
- (1) the commission,
  - (2) the administrator,
  - (3) the respondent as provided under MCR 9.115(F)(4),

| Alternative A (AGC Proposal)                                      | Alternative B (SBM Proposal)  |
|---|---|
| (4) <u>a respondent's employer as provided under MCR 9.114(b)</u> | [The state bar proposed no changes here and would not publish for comment the AGC's proposed new language in (D)(4).] |

- (45) members of hearing panels or the board,
- (56) authorized employees,
- (67) the Supreme Court, or
- (78) other persons who are expressly authorized by the board or the Supreme Court.

If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information must also be disclosed to the respondent, except as it relates to an investigation, unless the court otherwise orders.

- (E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission shall disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, upon request. The commission also may make such disclosure to the Judicial Tenure Commission, absent a request, and to:

- (1) the State Bar of Michigan Client Security Fund;
- (2) the State Bar of Michigan:
  - (a) Committee on Judicial Qualifications;
  - (b) Lawyers and Judges Assistance Program;
  - (c) District and Standing Committees on Character and Fitness; or,
  - (d) Unauthorized Practice of Law Committee,
- (3) any court-authorized attorney disciplinary or admissions agency, ~~or~~ including any federal district court or federal disciplinary agency considering the licensing of attorneys in its jurisdiction,
- (4) the Michigan Appellate Assigned Counsel System,

| Alternative A (AGC Proposal)  | Alternative B (SBM Proposal)  |
|---|---|
| <u>(5) any Michigan court considering the appointment of a lawyer in a pending matter as house counsel, or as a standing appointment,</u> | [Does not include the AGC's provision in (E)(5).]   |
| <u>(56) a lawyer representing the respondent in an unrelated disciplinary investigation or proceeding;</u>                                | <u>(5) a lawyer representing the respondent in an unrelated disciplinary investigation or proceeding;</u> |
| <u>(67) law enforcement agencies; or</u>  | <u>(6) law enforcement agencies; or</u>   |
| <u>(48) other persons who are expressly authorized by the board or the Supreme Court.</u>   | <u>(47) other persons who are expressly authorized by the board or the Supreme Court.</u>                 |

- ~~(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all requests for disclosure that have been filed with the board pursuant to subrules (D)(7) and (E)(4). The accounting shall include the board's disposition of each request.~~

Staff comment: The proposal would make primarily technical and clarifying changes, and would explicitly expand the list of agencies that would be entitled to

information regarding an attorney regarding misconduct. The AGC version includes language that would allow the AGC to disclose AGC files and records to an attorney's employer (under (D)[4]) and would require the AGC to disclose information concerning attorney or judicial misconduct to a court considering appointment of an attorney as house counsel or to a standing appointment (under (E)[5]). The SBM opposes these proposed changes.

#### Rule 9.127 Enforcement

- (A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.
- (B) Contempt. The administrator may enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must conform to MCR 3.606. The petition must be filed by the administrator in the circuit court in the county in which the alleged contempt took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline upon the basis of the same noncompliance with the discipline order. The circuit court shall waive fees and costs in an action brought by the administrator to enforce a disciplinary order.

Staff comment: The proposed change in this rule would require the circuit court to waive fees in an action brought by the grievance administrator on a disciplinary action.

#### Rule 9.128 Costs

- (A) Generally. The hearing panel and the board, in an order of discipline or an order granting or denying reinstatement, must include a provision directing the payment of costs within a specified period of time. Under exceptional circumstances, the board may grant a motion to reduce administrative costs assessed under this rule, but may not reduce the assessment for actual expenses. Reimbursement must be a condition in a reinstatement order.
- (B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include both basic administrative costs and disciplinary expenses actually incurred

by the board, the commission, a master, or a panel for the expenses of that investigation, hearing, review and appeal, if any.

- (1) Basic Administrative Costs:
  - (a) for discipline by consent pursuant to MCR 9.115(F)(5), \$750;
  - (b) for all other orders imposing discipline, \$1,500;
  - (c) with the filing of a petition for reinstatement ~~under MCR 9.124(A), where the discipline imposed was a suspension of less than 3 years,~~ \$750 as set forth in MCR 9.124(B)(2)(b)(i) and (ii);
  - ~~(d) with the filing of a petition for reinstatement under MCR 9.124(A), where the discipline imposed was a suspension of 3 years or more or disbarment, \$1,500.~~
- (2) Actual Expenses. Within 14 days of the conclusion of a proceeding before a panel or a written request from the board, whichever is later, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing, including expenses incurred during the grievance administrator's investigation. Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, the commission, and the panel, including the expenses of a master, shall be a part of the report in all matters of discipline and reinstatement.
- (C) Certification of Nonpayment. If the respondent fails to pay the costs within the time prescribed, the board shall serve a certified notice of the nonpayment upon the respondent. Copies must be served on the administrator and the State Bar of Michigan. Commencing on the date a certified report of nonpayment is filed, interest on the unpaid fees and costs shall accrue thereafter at the rates applicable to civil judgments.
- (D) Automatic Suspension for Nonpayment. The respondent will be suspended automatically, effective 7 days from the mailing of the certified notice of nonpayment, and until the respondent pays the costs assessed or the board approves a suitable plan for payment. The board shall file a notice of suspension with the clerk of the Supreme Court and the State Bar of Michigan. A copy must be served on the respondent and the administrator. A respondent who is suspended for nonpayment of costs under this rule is required to comply with the requirements imposed by MCR 9.119 on suspended attorneys.

- (E) Reinstatement. A respondent who has been automatically suspended under this rule and later pays the costs or obtains approval of a payment plan, and is otherwise eligible, may seek automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, a respondent who is suspended under this rule and, as a result, does not practice law in Michigan for 3 years or more, must be recertified by the Board of Law Examiners before the respondent may be reinstated.
- (F) Assessment of Costs. Other than for costs assessed under this rule, sanctions in the form of fines or costs are unavailable in disciplinary proceedings, except that, in granting an adjournment, a panel may require that a party pay costs associated with witnesses.

Staff comment: The proposed amendments in this rule would make primarily technical changes, with the exception of subsection (F).

AGC comment: Under proposed paragraph (F), neither side could be assessed sanctions in the form of fines or costs except as otherwise provided, or to obtain an adjournment. The rule is proposed in an attempt to avoid expensive, time-wasting, overly litigious collateral attacks during disciplinary pleadings.

SBM Workgroup comment: The AGC-proposed new paragraph (F) is intended by the AGC as a way of exempting the grievance administrator and its staff attorneys from being subjected to sanctions. Workgroup members other than the AGC representatives believe such an exemption is inappropriate.

#### Rule 9.129 Expenses; Reimbursement

The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, master, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.

#### Rule 9.130 MCR 8.122 Cases; Arbitration; Discipline; Filing Complaint by Administrator

- (A) ~~Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a request for investigation. No investigation may be made on a claim by an attorney against a client.~~
- (BA) Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. Except as otherwise provided by this subrule, the arbitration is governed by MCR 3.602. The award

and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends discipline of the attorney, it must also be treated as a request for investigation.

- (~~E~~B) Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator may ~~shall~~ file the complaint on behalf of the client and prosecute it to completion without cost to the client.

Staff comment: The proposed change in this rule would eliminate unnecessary and confusing language in subsection (A); the proposed amendments would not eliminate the ability of a client to seek compensation from an attorney under MCR 8.122.

Rule 9.131 Investigation of Member or Employee of Board or Commission; Investigation of Attorney Representing Respondent or Witness; Representation by Member or Employee of Board or Commission

- (A) Investigation of Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply:
- (1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send a copy of the answer to the ~~person who filed the request for investigation~~ complainant.
  - (2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.
  - (3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter.
  - (4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent, and the ~~person who filed the request for investigation~~ complainant. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file

under MCR 9.114(E). MCR 9.126(A) governs the release of information regarding the investigation.

- (5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).
- (6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.

If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.

- (B) Investigation of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:

- (1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.
- (2) The ~~C~~chief ~~J~~justice shall appoint a hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115, ~~or~~ 9.117, or 9.120, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the ~~C~~chief ~~J~~justice.
- (3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk.
- (4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122.

- (C) Investigation of Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission.

- (1) Request by a former client. A request for investigation filed by an attorney or witness against his or her counsel for alleged misconduct occurring in a disciplinary investigation or proceeding, shall be treated under the

procedures set forth in MCR 9.112.

- (2) Request by person other than former client. If a person other than the attorney's former client requests an investigation ~~If the request is for an investigation of an attorney~~ for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.
- (D) Representation by Commission or Board Member or Employee. A member or employee of the Attorney Grievance Commission or the Attorney Discipline Board and its hearing panels may not represent a respondent in proceedings before the commission, the board, or the Judicial Tenure Commission, including preliminary discussions with employees of the respective commission or board prior to the filing of a request for investigation.

Staff comment: The proposed amendments in this rule would make technical and clarifying changes.

#### Rule 8.110 Chief Judge Rule

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(7) [Unchanged.]

(8) Notice to the Attorney Grievance Commission. The chief judge of every judicial and circuit court shall provide to the commission a certified copy of any written opinion or order entered by the court holding a lawyer in contempt or finding that a lawyer has provided incompetent representation or engaged in misconduct that reflects adversely upon the lawyer's fitness to engage in the practice of law.

(D) [Unchanged.]

Staff comment: The proposed change in this rule would require the chief judge of every court to send a certified copy to the AGC of any order or opinion that holds a lawyer in contempt or includes a finding that a lawyer has provided incompetent representation or engaged in misconduct.

Rule 8.120 Law Students and Recent Graduates; Participation in Legal Aid Clinics, Defender Offices, and Legal Training Programs

- (A) [Unchanged.]
- (B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, the Attorney Grievance Commission, and the Attorney General.
- (C) [Unchanged.]
- (D) Scope; Procedure.
  - (1)-(3)[Unchanged.]
  - (4) A law student or graduate serving in a prosecutor's, county corporation counsel's, city attorney's, Attorney Grievance Commission's, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, Attorney Grievance Commission attorney, or Attorney General, except that
    - (a) the law student or graduate is subject to the conditions and restrictions of this rule; and
    - (b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, assistant Attorney Grievance Commission attorney, or assistant Attorney General.

Staff comment: The proposed changes in this rule would allow law students and recent law graduates to work in the AGC's offices as they can now for other public service agencies and offices.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or [MSC\\_clerk@courts.mi.gov](mailto:MSC_clerk@courts.mi.gov). All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2006-38.

CORRIGAN, J. I oppose the State Bar of Michigan's proposed amendment of MCR 9.104 (Alternative B).<sup>1</sup> Under Alternative B, the State Bar would circumscribe the existing grounds for attorney discipline and impinge on the Judicial Tenure Commission's ability to discipline judges. By contrast, the Attorney Grievance Commission's cogent proposed amendment of MCR 9.104 (Alternative A) not only lacks the flaws of Alternative B, but it also maintains or in certain cases expands the existing grounds for discipline.<sup>2</sup> Consequently, I support publishing Alternative A for public comment, but I oppose publishing Alternative B at this juncture.

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<sup>1</sup> Alternative B provides in pertinent part:

- (A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
  - (1) ~~conduct prejudicial to the proper administration of justice;~~
  - (2) ~~conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;~~
  - (3) ~~conduct that is contrary to justice, ethics, honesty, or good morals;~~
  - (4)(A) conduct that violates the standards or rules of professional responsibility  
conduct adopted by the Supreme Court;
  - (5) ~~conduct that violates a criminal law of a state or of the United States;~~
  - (6)(B) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;
  - (7)(C) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
  - (8)(D) contempt of the board or a hearing panel; or
  - (9)(E) violation of an order of discipline.

<sup>2</sup> Alternative A provides in pertinent part:

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- (A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
- (1) conduct prejudicial to the proper administration of justice;
  - (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
  - (3) conduct that is contrary to justice, ethics, honesty, or good morals;
  - (4) conduct that violates the standards or rules of professional conduct ~~responsibility~~ adopted by the Supreme Court;
  - (5) conduct that violates a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615;
  - (6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;
  - (7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
  - (8) contempt of the board or a hearing panel; ~~or~~
  - (9) violation of an order of discipline; or
  - (10) entering into an agreement or attempting to obtain an agreement, that:
    - (a) the professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the administrator;
    - (b) the plaintiff shall withdraw a request for investigation or shall not cooperate with the investigation or prosecution of misconduct by the administrator; or
    - (c) the record of any civil action for professional misconduct shall be sealed from review by the administrator.

One disconcerting aspect of Alternative B is that it would amend MCR 9.104 to constrict the existing grounds for attorney discipline. The State Bar asserts that Alternative B better aligns the grounds for discipline in MCR 9.104 with MRPC 8.4 and that it encourages attorneys to rely on the rules of professional conduct for information about misconduct. However, the State Bar fails to explain why its sizeable changes are necessary or advisable when it is undisputed that the standards set forth in subchapter 9.100 *et seq.*, “include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.” MCR 9.103(A). The State Bar also offers no persuasive justification for deleting four grounds for discipline from the current rule. See MCR 9.104(A)(1)-(3), (5). Additionally, the State Bar tends to ignore the practical effect of Alternative B—that is, Alternative B narrows significantly rather than maintains the existing grounds for discipline. For example, one ground for discipline under the current rule is “conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach.” MCR 9.104(A)(2). The State Bar proposes deleting this ground for discipline although MRPC 8.4 has no parallel provision. I would not circumscribe the existing grounds for attorney discipline. Insofar as the State Bar supports such efforts, I think that its proposal offends the underlying purpose of disciplinary proceedings, which this Court enacted not “as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession.” MCR 9.105.

Another problematic aspect of Alternative B is the State Bar’s apparent failure to consider how its proposal could hinder the Judicial Tenure Commission’s ability to discipline judges for lapses in professional conduct identified in the current rule. To the extent that the Judicial Tenure Commission relies on MCR 9.104 as a basis for establishing the grounds for judicial discipline, any proposed amendment of MCR 9.104 will affect the rules governing that body. Therefore, the State Bar’s proposal to delete four grounds for discipline from the current rule likely could impinge on the Judicial Tenure Commission’s ability to discipline judges under subchapter 9.200 *et seq.* Nonetheless, the State Bar views any effects of Alternative B on the Judicial Tenure Commission as outside the scope of its inquiry. I question whether the State Bar’s willful disinterest in considering the practical effects of Alternative B on the Judicial Tenure

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- (B) It is also misconduct and a ground for discipline if, through multiple acts and omissions, a lawyer demonstrates the absence of fitness to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. MCR 9.103(A). This is misconduct for which discipline can be imposed for the protection of the public, the courts, and the legal profession. MCR 9.105. In proceedings brought under this subrule, prior acts and omissions of the lawyer are admissible.

Commission embodies a serious effort to draft the proposed amendment of MCR 9.104 that best protects “the public, the courts, and the legal profession” in accordance with MCR 9.105. At a minimum, I would instruct the State Bar to carefully deliberate about the potential impact of its proposal on the Judicial Tenure Commission and address any drafting deficiencies before publishing Alternative B for public comment.

Accordingly, I oppose the inclusion of Alternative B in the Court’s order regarding the proposed amendment of MCR 9.104. I would publish Alternative A only.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 2010

*Corbin R. Davis*

Clerk